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Supreme Court, U.S.
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No. 10-137

IN THE

Supreme Court of the United States

FIRST BANK,

Petitioner,

v.

DJL PROPERTIES, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION FOR RESPONDENT DJL PROPERTIES, LLC

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for Writ of Certiorari remains accurate.

INTRODUCTION

In its Brief, Respondent DJL Properties, LLC, raises two new points in opposition to the Petition for a Writ of Certiorari. First, Respondent mistakenly contends that this Court does not have jurisdiction to review remand orders under 28 U.S.C. § 1453(c)(1). Second, Respondent argues that the question presented, whether *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100 (1941) prohibits a counterclaim defendant from removing a class action counterclaim under the Class Action Fairness Act, 28 U.S.C. § 1453(b), is somehow rendered to be not one of national importance merely due to a venue selection clause contained in the loan documents executed by Petitioner and Respondent. As is demonstrated below, both points are without merit.

ARGUMENT

I. In *The Hertz Corporation v. Friend*, this Court Specifically Rejected Respondent's Contention that this Court does not have Jurisdiction to Review a Remand Order Under 28 U.S.C. § 1453(c)(1).

Respondent argues that the language of § 1453(c)(1) only confers the right to review a remand order on a circuit court of appeals, and because this statute does not explicitly mention the Supreme Court by name, this Court does not have jurisdiction to entertain the pending Petition. However, this very argument was summarily rejected earlier this year by this Court in *The Hertz Corporation v. Friend*, 130 S. Ct. 1181 (2010). For the same reasons, this point should also be rejected in this case.

In *Friend*, the respondent similarly asserted that this Court lacks jurisdiction under § 1453(c) because the statute only permits appeals of remand orders to "courts of appeals." *Friend*, 130 S. Ct. at 1187. The respondent argued that because the statute does not explicitly list the "Supreme Court" in its text, this Court does not have jurisdiction to consider an appeal from a remand order. *Id.* The Supreme Court rejected this contention, reasoning:

> This argument, however, makes far too much of too little. We normally do not read statutory silence as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants. *Felker v. Turpin*, 518 U.S. 651, 660-661, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996); *Ex parte Yerger*, 75 U.S. 85, 8 Wall. 85, 104-105, 19 L. Ed. 332 (1869). Here, another pre-existing federal statute gives this Court jurisdiction to "revie[w] . . . [b]y writ of certiorari" cases that, like this case, are "in the courts of appeals" when we grant the writ. 28 U.S.C. § 1254. This statutory jurisdictional grant replicates similar grants that yet older statutes provided. *See, e.g.*, § 1254, 62 Stat. 928; §1, 43 Stat. 938-939 (amending § 240, 36 Stat. 1157); § 240, 36 Stat. 1157; Evarts Act, § 6, 26 Stat. 828. This history provides particularly strong reasons not to read § 1453(c)'s silence or ambiguous language as modifying or limiting our pre-existing jurisdiction.

Friend, 130 S. Ct. at 1187. Thus, this Court specifically found that § 1453(c) does not deprive the Supreme Court of jurisdiction to review remand orders. *Id.*

Here, for the same reasons as stated by this Court in *Friend*, Respondent's assertion that this Court does not have jurisdiction to consider the Petition for a Writ of Certiorari should be rejected.

II. The Venue Selection Clause is not a Valid Basis for the Denial of the Petition for a Writ of Certiorari.

A venue selection clause that was initially entered into by the Petitioner and the Respondent at the time of the loan is no basis to deny this Petition for a Writ of Certiorari. The venue selection clause quoted by Respondent provides, "If there is a lawsuit, [Borrower] [Grantor] [Guarantor] agrees upon Lender's request to submit to the jurisdiction of the courts of St. Clair County, State of Illinois." Respondent contends that because the Petitioner chose to bring its foreclosure action against the Respondent in state court, it should be required to defend in state court any multi-state class action counterclaims filed against it. *See* Opposition, p. 17. This argument fails for a number of reasons.

First, while the Petitioner may have agreed to venue in state court for the resolution of a dispute between the lender and this specific borrower, it never agreed to litigate in state court a multi-state class action counterclaim. Second, the venue selection clause that was entered into between the Respondent and the

Petitioner may not have even been agreed to by all members of the putative class, who reside in multiple states.

Moreover, there are countless disputes that could involve class action counterclaims where no venue selection clause would be at issue. Accordingly, the existence of the venue selection clause in this isolated case in no way detracts from the necessity for this Court to issue a determinative interpretation of § 1453(b) for all types of class action counterclaims. The question whether a counterclaim defendant may remove a qualifying class action under CAFA is a recurring issue of national importance that will arise irrespective of the existence of a forum selection clause.[1]

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1. In a related argument, Respondent states, "The vast majority of times the counterclaim defendant would have a choice of forum, i.e. state or federal." Thus, the argument goes, if a plaintiff chooses a state forum for its litigation, it should be deemed to have agreed to a state forum for any class action counterclaims, even class action counterclaims that have no relation to the original complaint, as can be the case in Illinois. *See* Opposition, p. 18. Of course, this contention is completely without merit in that there are a multitude of disputes that cannot be brought in federal court due to the fact that diversity or the amount in controversy is lacking.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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